No. 16183

In the United States Court of Appeals for the Ninth Circuit

GEORGE OLSHAUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED
MAR 30 1959
PAUL P. O'BRIEN, CLERK

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 52–59) are not officially reported.

JURISDICTION

This petition for review (R. 60–65) involves additions to the tax under Section 294(d) of the Internal Revenue Code of 1939 for the taxable years 1952 and 1953. On December 12, 1955, the Commissioner of Internal Revenue mailed to the taxpayer a statutory notice of deficiency for additions to the tax in the total amount of $1,416.02. (R. 1, 6–9.) Within ninety days thereafter, and on February 24, 1956, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiency under the provisions

of Section 272 of the Internal Revenue Code of 1939. (R. 3–9.) The decision of the Tax Court was entered on May 15, 1958. (R. 50.) The case is brought to this Court by a petition for review filed August 6, 1958. (R. 60–65, 68.) Jurisdiction is conferred by this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court has jurisdiction to render a decision where the Commissioner issued a statutory notice of deficiency which involved only additions to the tax under Section 294(d) of the Internal Revenue Code of 1939, and the taxpayer filed a petition for redetermination with the Tax Court.

2. Whether the Tax Court proceeding violates the due process clause of the Fifth Amendment to the Constitution in placing the burden of proof upon the taxpayer, and violates the Seventh Amendment in denying to him the right to a trial by jury in the Tax Court proceeding.

3. Whether the Commissioner's claim for the 1952 and 1953 additions to the tax, made in 1955, is barred by laches.

4. Whether the Tax Court was correct in holding that the taxpayer did not show that his failure to file declarations of estimated tax for 1952 and 1953 was due to reasonable cause.

5. Where the taxpayer fails to file a declaration of estimated tax, whether the Commissioner may impose concurrent additions to the tax under Section 294 (d)(1)(A) of the 1939 Code for failure to file a declaration of estimated tax and under Section 294

(d)(2) for substantial underestimation of the estimated tax.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 and of Treasury Regulations 118 are set forth in the Appendix, *infra.*

STATEMENT

The pertinent facts, some of which were stipulated (R. 16–18), and as found by the Tax Court (R. 53–55), may be stated as follows:

The taxpayer is an attorney and has practiced in the courts of California since 1926. (R. 53.)

The taxpayer filed a declaration of estimated tax either in 1943 or 1944. Under the belief that the law had been changed the taxpayer did not file any declarations during the years 1945 through 1953, which included the taxable years in issue. (R. 53.)

On January 15th of each year the taxpayer regularly filed a Form 1040 and paid the tax shown to be due. The taxpayer stated that he was under the impression that a filing of a declaration of estimated tax was optional if a Form 1040 was filed by January 15. The taxpayer was unable to recall how he gained this impression, and he made no investigation of the law. (R. 53.)

During the period 1945 through 1953 the returns filed on the Form 1040 by the taxpayer disclosed his failure to file declarations of estimated tax. During the period between 1944 and 1953 he received a refund and was billed for additional amounts due. During this period the taxpayer was not contacted by the In-

ternal Revenue Service, and he believes the adjustments referred to above were mathematical. (R. 53–54.)

In each of the years 1946 and 1950 the taxpayer reported income apportioned under Section 107 of the Internal Revenue Code of 1939. The taxpayer was unable to recall how he found out how to use and compute his income under this section but thought he received such information from conversations with other attorneys who were familiar with this section. (R. 54.)

In preparing his returns on the Form 1040 the taxpayer used as a reference book the instruction pamphlet which usually accompanied the form, where a reference to the instructions appeared on the face of the Form 1040. (R. 54.)

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to Section 294(d) of the 1939 Code. The taxpayer was unaware of this release until it was called to his attention in the fall of 1955 at a conference with revenue agents. (R. 54.)

In his deficiency notice the Commissioner made the following explanation (R. 54):

> You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

The Tax Court found that the taxpayer's failure to file declaration of estimated tax for the years 1952 and 1953 was not due to unreasonable cause. (R. 54–55.) The Tax Court held that the taxpayer was subject to the imposition of the addition to tax under Section 294(a)(1)(A) for failure to file declarations and under Section 294(d)(2) for substantial underestimation of the estimated tax for both years. (R. 55–59.)

SUMMARY OF ARGUMENT

The taxpayer in the present case did not file any declarations of estimated tax for the years 1944 through 1953. In 1955 the Commissioner imposed additions to the tax under Section 294 (d)(1)(A) and (d)(2) of the 1939 Code against the taxpayer for the years 1952 and 1953 for failure to file declarations and for substantial underestimation of the estimated taxes for these two years. The Commissioner issued a ninety-day notice to the taxpayer in which tax liability for only these additions was determined. The
filed a petition for redetermination with the Tax Court. There
taxpayer contested liability upon the grounds that the Tax Court lacked jurisdiction, that its proceedings were unconstitutional, that the Commissioner's determination was barred by laches, that the taxpayer had reasonable cause for failure to file the declarations, and that both additions could not be imposed concurrently. The Tax Court decided against the taxpayer on all of the above grounds.

1. The taxpayer chose to invoke the jurisdiction of the Tax Court for determination of this controversy, but the effect of his contentions now is to dis-

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pute it. However, a number of cases have sustained the jurisdiction of the Tax Court to determine controversies involving solely additions under Section 294(d) of the Internal Revenue Code of 1939. These decisions have recently been approved by this Court in *Granquist* v. *Hackleman,* decided February 13, 1959 (59–1 U.S.T.C., par. 9277).

2. The Tax Court proceedings involving the additions under Section 294(d) do not violate the Seventh Amendment to the Constitution by denying to the taxpayer a right to a jury trial. The additions here involved are civil sanctions, and Congress has broad discretion in establishing the procedures by which its tax exactions may be made effective. This discretion extends to permit civil sanctions to be imposed on the basis of facts determined by an administrative agency. In establishing the Tax Court it is clear that Congress intended fact finding to be done by the court and not by a jury. In any event, if the taxpayer desired a jury trial he could have paid the amount determined to be owing, brought a refund action and requested a jury trial.

The Tax Court proceedings also do not violate the due process clause of the Fifth Amendment by imposing the burden of proof upon the taxpayer. Here the burden of proof is imposed by statute, by Section 294(d)(1)(A), which requires that a taxpayer establish reasonable cause for failure to file a timely declaration. Congress can require a taxpayer to assume the burden of proof, even where additions are involved.

3. Where the Commissioner determined in 1955 that the taxpayer was liable for additions involving the years 1952 and 1953, the Commissioner's determination was timely made and was not barred by laches, even apart from the fact that the United States generally is not subject to a defense of laches in asserting its rights.

Further, the Commissioner's determination is not barred by any doctrine of equitable estoppel. Such a doctrine also generally is not applicable to errors in law; it has been held not to apply to permit a person to take advantage of his own wrongdoing; and mere acceptance or acquiescence in returns filed by a taxpayer in previous years creates no estoppel against the Commissioner for later years. Finally, the taxpayer has not shown how he has been prejudiced by the Commissioner's failure to assert liability against him for earlier years for failing to file declarations; if anything, the taxpayer has benefited.

4. Section 294(d)(1)(A) imposes an addition for failure to file a declaration unless such failure is shown by the taxpayer to be due to reasonable cause and not to willful neglect. The question of reasonable cause is one of fact. The statutory provision requiring a timely declaration to be filed (Section 58 of the 1939 Code) is clear on its face. The taxpayer previously filed a declaration. He was an experienced attorney, and was particularly qualified to determine whether he must continue to file declarations. Nevertheless, he proceeded upon a mistaken

impression that he was not required to file any declarations without bothering to investigate to determine what the law held and without seeking or receiving competent advice that he was no longer required to file. Under the facts, mere ignorance of the law or reliance upon unfounded rumor would not constitute reasonable cause. Also, mere reliance upon the Commissioner's failure to advise him in past years that declarations were due would not constitute a reasonable belief either that the Commissioner was not enforcing a statutory requirement of filing or that the law no longer required a filing.

(5) The question as to whether the Commissioner may impose concurrent additions under Section 294 (d)(1)(A) for failure to file a declaration and under Section 294(d)(2) for substantial underestimation of the estimated tax was decided by this Court in favor of the Commissioner in *Hansen* v. *Commissioner,* 258 F. 2d 585. This issue is currently pending before the Supreme Court in *Acker* v. *Commissioner,* 258 F. 2d 568 (C.A. 6th), rehearing denied, 258 F. 2d 575, certiorari granted, 358 U.S. 940 (October Term, 1958, No. 553). The taxpayer has not advanced any arguments in the present case which would justify this Court to reverse its decision in *Hansen.*

ARGUMENT

I. The Tax Court had jurisdiction to render a decision holding that taxpayer owed additions to the tax under Section 294(d) of the Internal Revenue Code of 1939

The only amounts in controversy are additions to the tax under Section 294 (d)(1)(A) and (d)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*)

for the years 1952 and 1953 respectively. (R. 52). Taxpayer chose to invoke the jurisdiction of the Tax Court for determination of this controversy. Yet he now argues (Br. 6–15), as he did in the court below, that the forum which he himself selected possesses no jurisdiction to determine the only matter in issue. Moreover, the jurisdiction of the Tax Court to pass upon the Commissioner's determinations with respect to additions under Section 294(d) of the 1939 Code has been sustained in a number of decisions where only additions to the tax were involved. *Davis* v. *Dudley,* 124 F. Supp. 426 (W.D. Pa.); *Newsom* v. *Commissioner,* 219 F. 2d 444 (C.A. 5th), affirming *per curiam* 22 T.C. 225; *Meyers* v. *Commissioner,* 28 T.C. 12; and *Marbut* v. *Commissioner,* 28 T.C. 687. (R. 55). In particular these cases have only recently been cited by this Court with approval in *Granquist* v. *Hackleman,* decided February 13, 1959 (59–1 U.S.T.C., par. 9277). There this Court indicated agreement with the view taken here by the Tax Court (R. 55), that the Tax Court is authorized to pass upon determinations of additions under Section 294(d) of the Internal Revenue Code of 1939 where only additions to the tax are involved.[1]

[1] As the *Hackleman* case also points out, in *Muse* v. *Enochs*, 164 F. Supp. 561 (S.D. Miss.), the District Court held that deficiency procedures also were applicable in the case of additions to the estimated tax under Section 6654 of the Internal Revenue Code of 1954. With deference, it is the Government's view that the 1954 Code contains different provisions from the 1939 Code leading to a contrary result in this connection and thus, that no deficiency notice is necessary before assessing additions under Section 6654 if there is no deficiency in tax. Ac-

II. The Tax Court proceedings involving the additions to tax under Section 294 (d)(1)(A) and (d)(2) of the Internal Revenue Code of 1939 do not violate the fifth and seventh amendments to the Constitution

It should first be noted that the taxpayer does not question the constitutionality of Section 294(d) of the 1939 Code, *supra*.[2] Instead, an examination of the taxpayer's brief on this issue reveals that he is contending that the procedures of the Tax Court itself violate the Fifth and Seventh Amendments. As we shall show, this contention is erroneous.

The taxpayer's contention (Br. 16–19), that to enforce collection of the additions by means of the Tax Court procedure would deny him his constitutional right to a trial by jury, appears to rest upon the assumption, repeatedly asserted by the taxpayer (see Br. 16, 17), that the additions under Section 294(d) "are imposed on the basis of alleged fault" and accordingly are either criminal or quasi-criminal in nature. The short answer to this is that these additions are only civil ad valorem sanctions, and Congress has broad discretion in establishing procedures by which its tax

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cordingly, the Government has appealed to the Court of Appeals for the Fifth Circuit the District Court decision in the *Muse* case.

[2] In *Erwin* v. *Granquist*, 253 F. 2d 26, this Court upheld the constitutionality of Sections 58 (Appendix, *infra*) and 294(d). In *Walker* v. *United States*, 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939, Section 294(d)(1)(A), *supra*, was held constitutional against an attack, among others, that it violated the due process clause of the Fifth Amendment, and in *Beacham* v. *Commissioner*, 255 F. 2d 103 (C.A. 5th), the Tax Court's determination, that Sections 58, 59 (26 U.S.C. 1952 ed., Sec. 59) and 294(d) of the 1939 Code did not violate the due process clause of the Fifth Amendment, was upheld.

exactions may be made effective. *Steward Machine Co.* v. *Davis,* 301 U.S. 548; *Helvering* v. *Davis,* 301 U.S. 619. This discretion extends to the imposition of additions by way of civil sanctions, as under Section 294(d), and to permit such civil sanctions to be imposed on the basis of facts determined by an administrative agency. *Helvering* v. *Mitchell,* 303 U.S. 391; *Walker v. United States,* 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939.

Further, the taxpayer's contention that he should not be denied a right to a trial by jury in the Tax Court ignores the long history of Tax Court procedure wherein Congress intended that fact finding should be done by the court and not by a jury. In *Wickwire* v. *Reinecke,* 275 U.S. 101, 105–106, the Supreme Court held that tax disputes need not be tried by jury trial if Congress does not desire this, and as Section 1117(b) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 1117) (as well as its forerunner provisions) indicates, Congress did not intend to permit a jury trial in the Tax Court. The taxpayer's attempt to distinguish *Wickwire* v. *Reinecke, supra* (Br. 18–19), upon the ground that that case dealt with proceedings to determine the amount of a tax and not with an adjudication of fault, is misplaced here since the additions here involved are civil sanctions, and the Tax Court has jurisdiction over such additions.

Additionally, as the Tax Court correctly holds (R. 56), the taxpayer could have paid the amount of the additions asserted to be owing, and then sue for a refund in the District Court and request a jury trial. There is no merit to the taxpayer's contention (Br.

17–18) that this alternative would place an unconstitutional burden upon his right to a jury trial since the latter would be conditioned upon his first paying in full the disputed amount. Apparently, what the taxpayer is here seeking is the right to a jury trial without having to make a prepayment of the amount in dispute. In this the taxpayer fails to realize that prior to the establishment of the Board of Tax Appeals in 1924, a taxpayer had to pay the amount of the assessed tax as a condition precedent to the right to sue for a refund. *Flora* v. *United States,* 357 U.S. 63, petition for rehearing pending. As the Supreme Court points out in *Flora,* to ameliorate the hardship of requiring prelitigation payment Congress created a special court where tax questions could be adjudicated in advance of payment. Thus, a taxpayer is now in a preferred position. He now has two independent remedies open to him, with advantages and disadvantages in each. He may not, however, pick and choose a little from each for his benefit but is restricted to the pursuit of either in an orderly manner. *Flora* v. *United States supra; Bendheim* v. *Commissioner,* 214 F. 2d 26 (C.A. 2d); *McConkey* v. *Commissioner,* 199 F. 2d 892, 895 (C.A. 4th).

There is also no merit to the taxpayer's contention (Br. 19–22), that to place the burden of proof upon him in the Tax Court proceeding in a case involving additions to the tax violates the due process clause of the Fifth Amendment. Rule 32 of the Rules of the Tax Court of the United States (as revised to January 15, 1957) states that the "burden of proof shall be upon the petitioner, except as otherwise

provided by statute, * * *." Section 294(d)(1)(A), *supra,* places the burden upon the taxpayer to show that his failure to file a declaration was due to reasonable cause and not to willful neglect. The question of burden of proof does not directly arise with respect to Section 294(d)(2), *supra,* since the addition for underestimation is automatically computed according to a formula set forth in the statute. In the present case there is no dispute either in the amount of the final tax or in the amount of the estimated tax, so that there is no controversy as to the amount of the addition for underestimation. Thus, the taxpayer's complaint that he must bear the burden of showing reasonable cause is not directed solely against Rule 32 but also encompasses Section 294(d).

Here again the taxpayer's contention is based upon the mistaken premise that the additions under Section 294(d) are not merely civil sanctions. Further, the taxpayer ignores the history of decided cases which hold that Congress can require a taxpayer to assume the burden of proof even where additions are involved. See *Boynton* v. *Pedrick,* 228 F. 2d 745 (C.A. 2d), certiorari denied, 351 U.S. 938, rehearing denied, 351 U.S. 990; see also *Helvering* v. *Taylor,* 293 U.S. 507, 515. It should also be noted that even if the taxpayer had paid the amount of the additions and sued for a refund, he would still have the burden of proof either in the District Court or Court of Claims proceeding.

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Finally, the taxpayer is wrong in asserting (Br. 19–22), that the due process clause is violated because the Commissioner acted in a dual capacity as an administrator responsible for collecting revenue and as a quasi-judicial official "who has to make a judicial finding of fault." In the first place, it is clear that the Commissioner has not made any judicial determination or acted in a judicial capacity in this case. The Commissioner's determination that the additions were owing was subject to a judicial proceeding before an independent tribunal which arrived at a decision based upon the record made before it. Here the taxpayer availed himself of such a review by the Tax Court. Although the Tax Court technically may be an independent agency rather than a court (*Lasky* v. *Commissioner,* 352 U.S. 1027, affirming *per curiam* 235 F. 2d 97 (C.A. 9th)), nevertheless its proceedings are, and have been intended by Congress to be, in every sense of the word, judicial (*Blair* v. *Oesterlein Co.,* 275 U.S. 220, 227; *Stern* v. *Commissioner,* 215 F. 2d 701, 707–708 (C.A. 3d)). Thus, on appeal the relevant question is not whether the presumptive correctness of the Commissioner's determination violated due process (which we deny), but whether the Tax Court's proceedings were so unfair as to deny the taxpayer due process. We submit that the taxpayer has completely failed to prove this.

III. The Commissioner's determination is not barred by laches

The doctrine of laches is that a court of equity will not generally enforce a stale claim on behalf of a party who has slept on his rights. Such a doctrine is

not applicable here. The Commissioner's assertion in 1955 of a tax liability of the taxpayer for the years 1952 and 1953 clearly was timely made. In any event, as the Tax Court correctly holds (R. 56), it has long been held that the United States is not subject to a defense of laches in asserting its rights. *United States* v. *Summerlin,* 310 U.S. 414, 416.

The taxpayer's reliance upon the doctrine of laches (Br. 37–39) appears primarily to be predicated upon the facts that the taxpayer failed to comply with the statute requiring the filing of declarations for ten years, but the Commissioner asserted liability against him only for the last two years.

Since the taxpayer's tax liability for each year presents a separate claim, we suggest that in reality the taxpayer is here relying upon supposed equitable estoppel. Such a doctrine is not applicable here. In the first place, the doctrine of quasi-estoppel has been held not to be applicable against the Commissioner for mistakes in law. See *Automobile Club* v. *Commissioner,* 353 U.S. 180, 183–184. Second, this doctrine has been held not to apply to permit a person to take advantage of his own wrongdoing. *Sterns Co.* v. *United States,* 291 U.S. 54, 61–62. Here the taxpayer is attempting to profit by his failing to have complied with the law. Third, the cases hold that mere acceptance or acquiescence in returns filed by a taxpayer in previous years creates no estoppel against the Commissioner. *Niles Bement Pond Co.* v. *United States,* 281 U.S. 357, 361–362; *Caldwell* v. *Commissioner,* 202 F. 2d 112, 115 (C.A. 2d). Finally, the taxpayer has not shown how he has been prejudiced unfairly here.

This case does not present any transaction in which the taxpayer has made any binding election to his prejudice for future years. If anything, it would appear that the taxpayer has benefited for eight years by his derelictions, and the Commissioner is the party who has been prejudiced.

The taxpayer also complains that the Commissioner is barred by laches because he allegedly destroyed old Forms 1040 and accompanying instruction pamphlets for years preceding 1952. However, the taxpayer has failed to show the significance of these documents for the years 1952 and 1953, particularly in view of the clear language of Section 58 (Appendix, *infra*). As a matter of fact the Commissioner did supply him with copies of some old blank Forms 1040 (R. 49–51, Ex. 10), and the Commissioner advised the taxpayer that the Archives and Library of Congress keep samples of outdated forms and instructions, and that one of the local libraries also may have them. At the Tax Court proceedings the taxpayer introduced into evidence his income tax returns for the years 1949 through 1953 (Ex. 4), blank Forms 1040 for the years 1943 through 1949 and 1951 (Ex. 5), and instruction pamphlets for the years 1948 through 1952 (Ex. 6). ~~and~~ It does not appear how the taxpayer has been prejudiced by not having available a Form 1040 for only one year, 1950, ~~and that~~ a year ~~being~~ prior to those here in issue, or by not having available instruction pamphlets for the years 1943 through 1947. Further, if there were relevant documents which the taxpayer has been unable to obtain, it would appear that this resulted from the fact that he made little effort to do

so. Finally, it would appear that the taxpayer is attempting to impose an impossible administrative burden by requiring the Commissioner to maintain an indefinite number of blank copies in stock of obsolete forms and pamphlets for an indefinite number of years, which previously had been made available to the public.[3]

IV. The Tax Court correctly held that the taxpayer did not show under Section 294(d)(1)(A) of the Internal Revenue Code of 1939 that his failure to file declarations of estimated tax for 1952 and 1953 was due to reasonable cause and not to willful neglect

Under the circumstances set forth below, Section 58 or the 1939 Code, (Appendix, *infra*) requires a taxpayer to file a declaration of estimated tax for the current year. Section 294(d)(1)(A), *supra*, provides for an addition to tax for failure to file a timely declaration "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect." The taxpayer in this case did not file any declarations for 1952 and 1953, and the Tax Court found and held (R. 54–55, 56–58) that his failure was not due to reasonable cause.

This question of reasonable cause is a question of fact. As the Eighth Circuit holds in *Coates* v. *Commissioner*, 234 F. 2d 459, 462–463:

> We agree with the statement of the Tax Court that whether or not reasonable cause exists for failure to file the required declara-

[3] For the above reasons, there is no merit to the taxpayer's contention (Br. 48–51) that the Commissioner's recovery should be limited to $48.97.

> tion is a question of fact to be decided upon the peculiar circumstances of each case. How far and to what extent a taxpayer may relieve himself of responsibility for the timely filing of tax returns or declarations of estimated tax by delegating that responsibility to another would seem to be a question which properly should be left to the Tax Court for decision. While it is apparent from the evidence and the findings of that court that the failure of the petitioners to file a timely declaration of estimated tax was due to their complete reliance upon Deeken to attend to all of their tax matters, we are not called upon to substitute our judgment for that of the Tax Court as to whether such reliance constituted reasonable cause for failure to file the declaration of estimated tax required of the petitioners by law.

See also *Ferrando* v. *United States,* 245 F. 2d 582, 587–588 (C.A. 9th); *Kaltreider* v. *Commissioner,* 255 F. 2d 833, 839 (C.A. 3d); *Clark* v. *Commissioner,* 253 F. 2d 745, 751 (C.A. 3d).

The taxpayer attempts to excuse his failure to file declarations in 1952 and 1953 on the grounds (Br. 25–27, 33) that, in preparing his tax returns for the years 1944 through 1953, he relied upon the instruction pamphlets which accompanied the Form 1040, and these pamphlets did not require the filing of both a declaration and a final return for the same years prior to 1950, and that (Br. 26, 28–33) he filed final returns for the years 1944 through 1953 which showed on their face that he had not filed any declarations, but the Commissioner did not raise

any objections until 1955. In essence, the taxpayer is seeking to justify his failure to file declarations upon a mistaken impression of the law and upon the failure of the Commissioner to advise him that he was not complying with the law. As the relevant decisions hold, such asserted excuses do not constitute reasonable cause.

The language of Section 294(d)(1)(A), *supra,* is unambiguous. It imposes the addition for failure to make and file a declaration unless such failure "is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect * * *." Thus, the burden is clearly upon the taxpayer to establish reasonable cause.

The requirement in Section 58 for making and filing a declaration is also very clear. This section provides that every individual whose gross income for the year from wages can reasonably be expected to exceed $4,500 plus $600 for each exemption, or whose gross income from sources other than wages can reasonably be expected to exceed $100 and his gross income to exceed $600, must file a declaration. For 1952 and 1953, the years here in issue, the taxpayer's income exceeded these statutory amounts. (Ex. 4.)

The taxpayer's asserted excuse of reasonable cause based upon a mistaken impression of the law is not supported by the relevant decisions. These hold that ignorance of statutory requirements, or reliance upon unfounded rumor, is inadequate to constitute reasonable cause for failure to file a declaration. *Fischer* v. *Commissioner,* 25 T.C. 102; *Joyce* v. *Commissioner,* 25 T.C. 13; *Riddell* v. *Commissioner,* decided March

27, 1956 (1956 P–H T.C. Memorandum Decisions, par. 56,074), appeal to the Fifth Circuit dismissed July 3, 1957; *Hansen* v. *Commissioner,* decided June 28, 1957 (1957 P–H T.C. Memorandum Decisions, par. 57,113), affirmed and reversed on other issues by this Court, 258 F. 2d 585, currently pending in the Supreme Court on other issue (October Term, 1958, No. 380). Furthermore, the decisions hold that a mistaken impression that if a taxpayer files a final return by January 15th, he need not file a declaration is not sufficient to constitute reasonable cause. *Fischer* v. *Commissioner, supra.* See *Joyce* v. *Commissioner, supra.*[4]

These decisions are particularly applicable here. The taxpayer is a lawyer of over thirty years experience. He should have been aware of the plain requirement to file a declaration. In any event, he is particularly qualified to investigate to determine whether his impressions of the law were correct. Indeed, when it was to his advantage, he had no diffi-

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[4] Section 58(d)(3) of the 1939 Code states that if a taxpayer files a final return by January 15th of the succeeding taxable year and pays in full the amount of the tax, the final return would take the place of a declaration, and the taxpayer would not be required to file a separate declaration if he had not previously been required to file a declaration. Also, if the tax shown on the final return was greater than the amount previously estimated, then a final return filed by January 15th would be considered as an amendment of the declaration and a separate amended declaration need not be filed. This provision, however, clearly does not dispense with the necessity for filing a timely declaration for the previous taxable year where one's income can be reasonably estimated to exceed the statutory amount. As we have pointed out, *supra*, the taxpayer's income for 1952 and 1953 exceeded the statutory amounts, and required a timely declaration to be filed.

culty in acquiring a correct understanding of the more complex requirements of Section 107 of the 1939 Code (26 U.S.C. 1952 ed., Sec. 107), relating to the spreading out over several years of compensation for services rendered for a period of thirty-six months or more. (R. 40–42.) On the other hand, when it was not to his advantage, he admitted (R. 42–43) that he did not make any attempt to ascertain the statutory requirements for filing a declaration. The taxpayer's claimed lack of knowledge is further suspect in view of his previously having filed a declaration for 1943 (R. 33), and his admission (R. 42–43) that, although he understood that the law was changed in 1944 to make it optional either to file a declaration or a final return, he did not know upon what basis he understood this to be so. He did not verify his impression but decided anyway not to file declarations, although he had during these years verified other matters. Thus, as this Court has held in another case involving the imposition of negligence penalties (*Fihe* v. *Commissioner,* decided October 21, 1958 (1958–2 U.S.T.C., par. 9891)), as an experienced attorney, the taxpayer "cannot claim ignorance as an excuse for his flagrant disregard of the revenue laws."

Nor can the taxpayer take much comfort from his assertion (Br. 26–28) that none of the pamphlets prior to 1950 nor the Forms 1040 affirmatively required him to file a declaration. Contrary to this assertion, an examination of the Forms 1040 for the years 1943 through 1949 and 1951 (Ex. 5) reveals that these contained spaces where a taxpayer was re-

quired to show the amount he paid on his declaration of estimated tax. Further, the instruction pamphlets for the years 1948 through 1952 (Ex. 6) referred to the amount of the estimated tax which the taxpayer had previously paid (pp. 2, 16) and to the form on which a declaration of such tax had been made and filed. The pamphlet also advised the taxpayer (p. 1) that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue. Thus, a taxpayer, and particularly one who was an experienced attorney, was clearly placed on notice that he was required to file a declaration, or at the very least, to check whether a declaration should be filed. Suffice it to say that, with no more notice and less qualification to ascertain the law, hundreds of thousands filed such declarations during these years. The taxpayer's failure to file a declaration under these circumstances is clear evidence of a lack of reasonable cause.

There is also no merit to the taxpayer's contention (Br. 26, 28–33) that his reliance upon the Commissioner's failure to advise him that he was not complying with the law constitutes reasonable cause for not filing. The decisions have repeatedly rejected the contention that a taxpayer may rely upon the Commissioner's failure to notify him as constituting reasonable belief that the Commissioner is not enforcing the requirement to file a declaration. *Coates* v. *Commissioner, supra; Fischer* v. *Commissioner, supra; Joyce* v. *Commissioner, supra; Marbut* v. *Commissioner,* 28 T.C. 687; *Hansen* v. *Commissioner, supra.* As these cases hold, a failure to comply with the law

is not sufficient to shift upon the Commissioner the responsibility which is imposed by the statute upon the taxpayer. See *Caldwell* v. *Commissioner, supra.*[5]

V. Where the taxpayer failed to file any declarations of estimated tax for 1952 and 1953 the Tax Court correctly held that he is liable for additions to tax concurrently for substantial underestimation of the estimated tax under Section 294(d)(2) of the 1939 Code and for failure to file any declarations under Section 294(d)(1)(A)

Since the taxpayer failed to file any declaration of estimated tax for 1952 and 1953, the Commissioner imposed additions to tax for both years under Section 294(d)(2) of the 1939 Code, *supra,* for substantial underestimation of the estimated tax, in addition to additions for both years under Section 294(d)(1)(A),

[5] The taxpayer's reliance (Br. 34) upon such decisions as *Hatfried, Inc.* v. *Commissioner*, 162 F. 2d 628 (C.A. 3d); *Orient Investment & Finance Co.* v. *Commissioner*, 166 F. 2d 601 (C.A.D.C.); and *In re Fisk's Estate*, 203 F. 2d 358 (C.A. 6th), is misplaced. The present case does not present a situation like that involved in *Hatfried* and *Orient* where the taxpayers were faced with complicated problems of ascertaining whether they came under special statutory provisions, such as the personal holding company provisions, and where they reasonably could rely upon the advice of counsel or a qualified accountant that they did not come within such provisions and therefore were not required to file personal holding company returns. Also, the present case does not involve a situation like that in *Fisk's Estate*, where it was held that an executrix could rely upon an attorney to file a timely estate tax return. But see *Ferrando* v. *United States*, *supra.* Instead, as we have pointed out, *supra*, in the present case the requirement to file a declaration is plain, the taxpayer previously had filed a declaration, he was an experienced attorney but failed to ascertain whether he need not continue to file a declaration, and the record does not show that he was ever advised that he no longer was required to estimate.

supra, for failure to file declarations. The basis for the Commissioner's action, as expressed in Treasury Regulations 118, Section 39.294–1(b)(3)(a) (Appendix, *infra*), is that in the event of a failure to file a declaration the amount of the estimated tax for purposes of determining the underestimation is zero. The Tax Court sustained the imposition of both additions. (R. 58–59.)

This question was squarely before this Court in *Hansen* v. *Commissioner,* 258 F. 2d 585, currently pending on another issue in the Supreme Court (October Term, 1958, No. 380), wherein this Court held that both additions may be imposed concurrently. *Patchen* v. *Commissioner,* 258 F. 2d 544 (C.A. 5th); *Abbott* v. *Commissioner,* 258 F. 2d 537 (C.A. 3d), and *Kilborn* v. *Commissioner* (C.A. 5th), decided September 18, 1958 (1958–2 U.S.T.C., par. 9847), also support the Commissioner's position in this case. On the other hand, *Acker* v. *Commissioner,* 258 F. 2d 568 (C.A. 6th), rehearing denied, 258 F. 2d 575, held that only the addition for failure to file a declaration may be imposed, and that the provision of Treasury Regulations 111, Section 29.294–1(b)(3)(A), promulgated under the Internal Revenue Code of 1939 (which is similar to the above provision of Treasury Regulations 118), is invalid insofar as it holds to the contrary. The Commissioner filed a petition for a writ of certiorari on this question in *Acker* on December 2, 1958, and the Supreme Court granted his petition on January 19, 1959 (October Term, 1958, No. 553) (358 U.S. 940). See also *Harp* v. *Commissioner* (C.A. 6th), decided February 11, 1959

(1959–1 U.S.T.C., par. 9240), opinion modified by order of March 19, 1959. But see *Delsanter* v. *Commissioner* (C.A. 6th), decided March 4, 1959 (28 T.C. 845, 861–862), where the Tax Court had upheld the imposition of both additions and the Sixth Circuit, in a *per curiam* order, affirmed the decision of the Tax Court "upon the grounds and for the reasons stated in the opinion of Judge Raum filed July 18, 1957."

We submit that the taxpayer has not advanced any arguments which would warrant this Court to reverse its decision in *Hansen* v. *Commissioner, supra.* The taxpayer's contentions are contradictory. He first argues (Br. 40–41) that the addition for substantial underestimation under Section 294(d)(2), *supra,* cannot exist alone, but must fall along with the addition for no filing, i.e., the excuse of reasonable cause which will justify a failure to file will also expunge the addition for substantial underestimation. However, the language of Section 294(d)(2) does not contain any excuse based on reasonable cause, in contrast to the language of Section 294(d)(1)(A), and the relevant decisions hold that reasonable cause is not a defense to the imposition of additions under Section 294(d)(2). *Kaltreider* v. *Commissioner, supra; Clark* v. *Commissioner, supra; McMurtry* v. *Commissioner,* 262 F. 2d 589 (C.A. 5th), affirming *per curiam* 29 T.C. 1091; *Smith* v. *Commissioner,* 20 T.C. 663; *Estate of Hays* v. *Commissioner,* 27 T.C. 358. See *Patchen* v. *Commissioner, supra.*

The taxpayer next contends, in essence (Br. 41–48), that the additions under Section 294 (d)(1)(A) and (d)(2) are imposed for separate acts, that a failure

to file a declaration comprises only one act, and that, in the absence of clear language in the statute, both additions may not be imposed for failure to perform a single act. We submit that this contention has been presented and considered in the above Court of Appeals decisions. In any event, it is clear, as the decisions in *Hansen, Patchen* and *Wolf* point out, that both the statutory scheme and the legislative history show that Congress intended both additions to apply where a declaration is not filed. S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345), H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372); H. Rep. No. 1337, 83d Cong., 2d Sess., p. 100 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769). See *Cammarano* v. *United States* (Sup. Ct.), decided February 24, 1959 (1959-1 U.S.T.C., par. 9262), with respect to the weight to be given to subsequent Congressional action upon an interpretation given a previous statute by the Regulations and in demonstrating prior Congressional intent.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be affirmed.

Respectfully submitted.

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March 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; and Sec. 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable but including every alien individual who is a resident of Puerto Rico during the entire taxable year) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

* * * * *

(d) *Time and Place for Filing.*—

(1) *In general.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

*   *   *   *   *

(3) *Return as declaration of amendment.*—If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

*   *   *   *   *

(26 U.S.C. 1952 ed., Sec. 58.)

Sec. 271 [As amended by Sec. 14(a), Individual Income Tax Act of 1944, *supra*]. Definition of Deficiency.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return

was made by the taxpayer and an amount shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 263(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu

of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Sec. 294. [As amended by Sec. 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21; Secs. 6(b)(8), and 13(b) of the Individual Income Tax Act of 1944, *supra;* Sec. 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; and Sec. 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452]. Additions to the Tax in Case of Nonpayment.

* * * * *

(d) *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure To Pay Installments of Estimated Tax Declared.*—Where a declaration of

estimated tax has been made and filed within the time prescribed or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the tax-

able year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66⅔ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.294–1. *Additions to the tax.*—(a) *In general.*

Section 294(d) provides for certain additions to the tax in the case of—

(1) Failure to file timely a declaration of estimated tax;

(2) Failure to pay within the time prescribed any installment of declared estimated tax; and

(3) Substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.* (i) Section 294(d)(1)(A) provides for an addition to the tax in the case of a failure to make and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 percent of the unpaid amount of each installment and in addition 1 percent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 percent of the unpaid portion of such installment. For the purposes of section 294(d)(1)(A), the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits for tax withheld at source.

* * * * *

(2) *Failure to pay installment of declared estimated tax.* (i) Section 294(d)(1)(B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (a) where a timely declaration

of estimated tax has been made and filed or (b) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the tax shall be in an amount equal to 5 percent of the unpaid amount of each installment of declared estimated tax and in addition 1 percent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with respect to any installment due but unpaid to 10 percent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under Section 294(d)(1)(A) applies.

* * * * *

(3) *Substantial understatement of estimated tax.* (i) Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer. Except as hereinafter provided—

(a) In the case of individuals, other than those exercising the election under Section 60 (a), relating to farmers, an addition to the tax under Section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages under Section 35 and the credit under Section 32) is less than 80 percent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

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U. S. GOVERNMENT PRINTING OFFICE: 1959